

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-517

October 9, 2003

MAINE PUBLIC UTILITIES COMMISSION
Selection of Conservation Service Provider
(Chapter 381)

ORDER ADOPTING RULE
AND STATEMENT OF
FACTUAL AND POLICY
BASIS

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

We adopt a rule to establish procedures governing the selection of service providers for conservation programs. The Commission will contract with service providers to deliver and assist with the delivery of conservation programs to Maine's transmission and distribution (T&D) utility customers. By the terms of the rule, the Commission will select most service providers by means of a competitive bid process that will be conducted by issuing Requests for Proposals (RFPs) or similar documents. The rule also will permit the Commission to select some service providers without a competitive bid process, when such sole-source contracting is the most efficient means to deliver conservation programs, or (for example) when low-income customer programs can be delivered by groups that the T&D utilities already used to deliver such services.

II. BACKGROUND

P.L. 2001, ch. 624 (the Conservation Act) directs the Commission to develop and implement electric energy conservation programs that are consistent with the goals and objectives of an overall energy conservation program strategy that the Commission must establish. The programs must be cost effective, according to a definition that the Commission also must establish.

The Commission may arrange delivery of conservation programs by contracting with service providers. 35-A M.R.S.A. § 3211-A(3). In the Conservation Act, "service provider"

[m]eans a public or private provider of energy conservation services or an entity selected by the Commission to contract with such providers or otherwise arrange the delivery of conservation programs.

35-A M.R.S.A. § 3211-A(1)(G).

The Act directs the Commission to select service providers through a competitive bid process. 35-A M.R.S.A. § 3211-A(3)(A). Subsection 3211-A(3)(C) describes

circumstances under which the Commission may select service providers without a competitive bid process. While the Commission is not subject to rules adopted by the State Purchasing Agent in selecting service providers, we must adopt our own rule establishing procedures governing the selection of service providers. 35-A M.R.S.A. § 3211-A(3). We are directed to consult with the State Purchasing Agent in developing our rule. The rule we adopt to govern selection of service providers is designated a routine technical rule under the Administrative Procedure Act. See 5 M.R.S.A. chapter 375, subchapter II-A.

The Commission opened an Inquiry (Docket No. 2002-272) in order to obtain information and comments from interested persons about our rule concerning the selection of service providers.¹ We asked for general comments and also posed a set of questions that we asked commenters to address in written responses. The questions, pertaining to provisions that should govern the bidding and selection process, asked the extent to which bid criteria should be established in the rule or left to each Request for Bids (RFBs),² whether bids could or should be based on objective criteria like price, and if not, what subjective criteria should be used, and last, whether T&D affiliates should be allowed to bid to become service providers in the T&D service territory.

Central Maine Power Company (CMP), Bangor Hydro-Electric Company (BHE), Maine Community Action Association (MCAA), the Office of the Public Advocate (OPA), and Combined Energies, (a division of Union Water Power Company, an affiliate of CMP) filed written comments.

CMP stated that price should be a prime consideration but that other evaluation criteria should also be considered, including technical expertise, experience in the industry and dealing with the relevant customer classes, qualifications of key personnel and satisfactory references. CMP added that criteria should vary from program to program, so the evaluation criteria should be established in the RFB rather than the rule. CMP also asserted that utility affiliates should be permitted to participate in all bid processes. As the Commission will be selecting the winning bidders, in CMP's view, there could be no chance for an unfair advantage to be given the affiliate.

BHE commented that the bidding system should be designed to give preferences to in-state providers. The rule should be written so that it affords flexibility within the RFBs. BHE also stated that bids should not be judged only on price and that affiliates should be allowed to bid.

¹ The Inquiry also sought comments on the definitions of small business consumers and low - income residential consumers, other provisions for which the Legislature directed the Commission to promulgate rules. Small business consumers and low-income residential consumers were defined by rule in a rulemaking that was initiated on August 20, 2002 and adopted as a rule and made effective on December 9, 2002. Order Adopting Rule, Docket No. 2002-473 (November 6, 2002).

² Throughout this document the terms Request for Bids (RFBs) and Request for Proposals (RFPs) are used interchangeably.

Likewise, MPS stated that flexibility was essential in evaluating bids and that it was not desirable nor practical to select on price alone. MPS recommended that the Commission be able to determine the details of the bid process in the RFB rather than rule.

MCAA commented on the provisions that govern the selection of service providers for low-income residential customers. Service providers for programs directed at low-income customers should be knowledgeable of the problems, needs and special circumstances of low-income households and should be experienced in working with such households. MCAA added that the Commission's rule should provide that low-income program service providers be able to coordinate delivery of conservation programs with other programs for which low-income households are eligible. Low-income service providers should also display an organizational commitment to bettering the lives of low-income persons. In MCAA's view, the Commission should have flexibility to set bid criteria in the RFBs. Moreover, the Commission should be inclined to bypass the bid process for delivery programs to low-income households. Last, MCAA opposes using T&D affiliates as service providers because of T&D utilities' financial disincentive to encourage electricity conservation.

The OPA stressed the need for flexibility. The Commission should be guided by its experience in the standard offer bidding process and more generally by its experience in contracting for goods and services. In evaluating bids, the OPA recommended that experience and expertise be the principal qualifications. The OPA noted that experience and expertise counts for 50% of total points in its evaluation of bids for consulting services, while cost counts 25%. The OPA also stated that, because of the subjective nature of selecting conservation program service providers, the Commission should use a team of evaluators. The entire team should evaluate using the same format. The team should strive for a consensus recommendation but perform individual and independent evaluations. The OPA was concerned about T&D affiliates winning contracts and then sharing employees or facilities with the T&D utility. The OPA also stated that, because of the utility's disincentive to reduce consumption, the affiliate may not do a good job as service provider. The OPA suggested that utility affiliates could start with a score of -5 (minus five), presumably on a scale of 100, to account for this possibility.

Combined Energies stated that utility affiliates should be allowed to participate, but that utility affiliates should earn the business just like any other bidder. Combined Energies commented that historical performance should be the most important evaluation criterion. Combined Energies also stated that the low bid frequently does not result in best performance or lowest life-cycle costs. It recommended that the Commission be innovative and creative in adopting "alternative delivery mechanisms" or other "best value" contracting methodologies.

The Commission held a public meeting on this Inquiry on June 26, 2002. Dick Davies appeared on behalf of MCAA. Linda Viens appeared on behalf of CMP. Rich Rusnica appeared on behalf of BHE. Steve Ward, the Public Advocate, also appeared.

All commenters at the public meeting generally agreed that the Commission's service provider selection process rule should provide the Commission flexibility and that non-price considerations and reputation should be as important if not more important than price. There was also some sentiment that in-state providers should be favored.

We will discuss the Docket No. 2002-272 comments in the course of the section-by-section discussion of the rule.

The Commission's Director of Energy Programs and other members of the Commission Staff who serve on the Efficiency Maine Team met with the State Purchasing Agent at that time, Richard Thompson, on August 8, 2002.³ Other Staff from the Division of Purchases also attended the meeting. The meeting attendees discussed the Division of Purchases' Rules For Purchase of Services and Awards (Chapter 110 of the Department of Administration and Financial Services (DAFS) Rules, 18-554 C.M.R. 110), as well as the Bureau of General Services' Rule for Appeal of Contract and Grant Awards (Chapter 120 of DAFS's Rules 18-554 C.M.R. 120). The attendees also discussed the Commission's use of competitive bidding processes in implementing some of the interim conservation programs. We will discuss DAFS Rules and other issues raised during our consultation with the State Purchasing Agent in the section-by-section description of the rule.

The Commission issued a Notice of Rulemaking and a proposed rule on July 28, 2003. Pursuant to the Notice, we held a rulemaking hearing on August 26, 2003. A representative from CMP spoke at the hearing, indicating support for the rule as proposed. No other persons spoke at the hearing. Written comments were received from L.K. Goldfarb Associates (Goldfarb), Quality Conservation Services (QCS) and the Acting Director of the Division of Purchases (the State Purchasing Agent).. Goldfarb was chosen by the Commission through a competitive bid process as the contractor for the Commission's interim small business conservation program. Goldfarb stated that the proposed rule was "easy to understand, and highly workable from a bidder's view point." QCS stated that it supports the proposed rule.

The State Purchasing Agent made two suggestions. Within Section 2(G)(2) of the rule, she suggests we include scoring weights for each criterion. She also suggests that, in the bid review process subsection, (Section 2(G)(4), we limit the additional data or material we ask a bidder to provide to data or material that does not significantly vary from the proposal or RFP. The term "significantly vary" term should be defined as in 5 M.R.S.A. § 1825-A, within the subchapter describing the State Purchasing Agent's duties and rulemaking authority.

³ With the recent legislation that shifted responsibility for certain energy related programs from the Department of Economic and Community Development to the Commission, the Director is now called the Director of Energy Programs and Efficiency Maine is a sub-unit of the Energy Programs. (P.L. 2003, ch. 20, § RR-8-12). Throughout the rule we adopt today, we have updated the Director's title to reflect this recent change.

III. DISCUSSION OF INDIVIDUAL SECTIONS

1. Section 1: General Provisions and Definitions

Subsection A states the purpose of the rule, to establish the procedures governing the selection of service providers of conservation programs.

Subsection B contains the definitions for the rule.

Subsection 1 defines “aggrieved person” in a manner similar to the definition of the same term in DAFS rule, Chapter 120. The Commission has not included the words “financially, professionally and personally” to modify the term “adversely affected,” that are included in the DAFS Chapter 120 definition. The words “financially, professionally or personally” are not included because the additional words “financially” and “professionally” appear unnecessary and “personally” adds a concept that is too subjective. For purposes of our rule, only *bidders* who are adversely affected are “aggrieved.”

The definition of “conservation programs” is taken directly from the Conservation Act.

The definition of “Contract Review Committee” is taken from the definitional section of DAFS Chapter 110, Rule for the Purchase of Services and Awards.

The definition and concept of “Program Opportunity Notice” is taken from the New York State Energy Research and Development Authority (NYSERDA), the state agency that sponsors conservation programs in New York.

The definition of “Request for Proposal” is similar to that in the DAFS Chapter 110. The term “Request for Qualifications” is similar to “Request for Proposals,” but with the focus on technical qualifications only. The DAFS Rules do not have a similar provision for RFQs, but the concept has been commonly used in the conservation services arena.

The first sentence of the definition of service provider is taken directly from the Conservation Act. The second sentence is intended to clarify that “service providers” may only constitute part of the delivery mechanism of a conservation program, such as firms that process or pay coupons and rebates, and that the evaluation function is an integral part of a conservation program, so a firm that performs a program evaluation function is likewise a “service provider.”

The other definitions are self-explanatory.

2. Section 2: Competitive Procurement

Subsection A begins with the statutory presumption that service providers will be selected using a competitive bidding process. 35-A M.R.S.A. § 3211-A (3)(A).

Subsections B through E generally describe RFPs, RFQs, PONs and the process that will be used in issuing them, in answering questions about them and submitting bids in response to them. The DAFS Chapter 110 (Rules for the Purchase of Service and Awards) contains similar provisions, as do the standard offer bidding provisions within our Chapter 301. In general, we have followed the advice of Docket No. 2002-272 commenters so that the rule provides flexibility in writing and processing RFPs.

In Subsection E, Submission of Bids, the rule provides that, during the evaluation and bid award process, bids will be treated as confidential and not subject to public disclosure. However, after the notification of the contract award, all bids will become public documents and subject to disclosure under the Freedom of Access Act. 1 M.R.S.A. § 401–417. This provision remains unchanged from the proposed rule. The Division of Purchases treats bids that it receives as State Purchasing Agent to be public documents. In our standard offer bid process, we treat bids as confidential and subject to a protective order. Standard offer bidders seek such treatment and note that such confidential treatment is typically granted to power supply bids in the private sector. We learned during competitive bid processes conducted in the interim program period that potential bidders in the conservation arena do not have the same expectations about confidential treatment of their bids, except during the evaluation process. We do not believe that the failure to grant confidential treatment will cause conservation service providers NOT to bid in our bidding processes. Indeed, we did not receive any comments on this provision in our proposed rule. Therefore, we decide to make all bids received subject to public disclosure.

Subsection F is taken from our Chapter 301. Chapter 110 of the DAFS Rules similarly excludes late submitted bids. Subsection F also provides that the Commission may reject all bids because the price is unreasonably high or because acceptance would not be in the public interest. We believe that the Commission must have the discretion to decide that none of the bids is qualified.

Subsection G deals with the evaluation of bids and the selection of winning bidders. Subsection 1 establishes a Proposal Review Team to evaluate the bids. The Commission's Director of Energy Programs will be the Chair of each Proposal Review Team unless he/she designates a substitute. We decide to delegate the selection process of service providers because such evaluation will be particularly detailed and fact-specific and will not present important questions of regulatory policy that are often presented, for example, in the standard offer context.

We adopt a team approach for this delegated task of evaluation because, as the OPA suggested in its Docket No. 2002-272 comments, the subjective nature of

selecting conservation program service providers lends itself to a team approach. Moreover, the work of the Commission staff is typically carried out in teams and thus staff is adept at using a team approach. A team approach will also permit the Director to include persons from outside the Commission when warranted.

Subsection G (2) deals with selection criteria. Cost, experience and qualifications, and responsiveness to the solicitation are typically included in RFPs issued through the Division of Purchases and their inclusion is consistent with the advice received in our Inquiry, Docket No. 2002-272. "Promoting the development of resources, infrastructure and skills within the State, to the extent practicable," is taken from the Conservation Act. We add a provision for the Director to include other selection criteria because, in our view, it is important to maintain such flexibility. The weight to be given each of the selection criteria is left to the RFP. By allowing the Director to add selection criteria and to assign the weight to be given each of the criteria within the RFP document, we have followed CMP's advice to establish evaluation criteria in the bid document rather than the rule. We agree with CMP's reasoning that the importance of the various criteria may vary from program to program, and therefore do not adopt the State Purchasing Agent's suggestion to set the scoring weights in the rule. The process of assigning the weight to be given each of the criteria in the RFP, before bidders prepare and submit bids, is still fair to bidders.

Subsection G (3) provides that all members of a Proposal Review Team will provide written documentation of his/her bid evaluation.

Subsection G (4) provides that the Proposal Review Team may ask for additional data from bidders, may review past assignments or check with prior clients of the bidders, or schedule interviews or meetings with bidders. Given the subjective nature of selecting program service providers, these post-bid submission activities can be important in making the best contract award decision. Subsection 4 permits all of these activities to be conducted for a subset of the bidders rather than all bidders. Our standard offer bid experience has taught us that the ability to narrow the evaluation process to a "short-list" of finalists can be necessary to make the selection process manageable.

Subsection G (5) permits the Proposal Review Team to conduct limited discussions or negotiations and thereafter seek amendments to the bids as a result of the discussions and negotiations. These provisions add the kind of flexibility that the Docket No. 2002-272 Inquiry commenters recommended, so that the selection results will be improved while keeping the bid process fair. Like Subsection G (4), Subsection G (5) permits such limited discussions and negotiations to take place as to a subset of bidders rather than the entire set of initial bidders.

The State Purchasing Agent suggests we restrict the additional data or material, and presumably amendments we might seek from bidders, to data, material or amendments that do not significantly vary the content, nature or requirements of any bid

or RFP. She further suggests that we define “significantly vary” in the manner defined in the statute describing her duties and rulemaking authority (5 M.R.S.A. § 1825-A), namely a change to a bid or invitation to bid that affects the price of goods or services requested.

Although the Conservation Act exempts the Commission from the State Purchasing Agent’s rules, we adopt her suggestion in part. We agree that the Commission should not substantially change the RFP, or the nature of the bids originally sought from bidders, without giving all bidders notice of the change and time to modify their bids. We add a sentence to Subsection G(5) to implement this suggestion.

We do not, however, extend the “substantially vary” definition to changes in bids themselves. At times, perhaps most times, program RFPs will leave bidders to decide about program delivery mechanisms and virtually all details of a proposed program. In such situations, when the Proposal Review Team seeks additional data or engages in discussions, the Team may desire to seek changes to a promising proposal so that the program will better achieve the Commission’s goals and objectives and statutory directives. Because we believe the State Purchasing Agent’s suggested language may restrict the Commission’s ability to seek bid changes that will better achieve our goals, we do not restrict our ability to seek bid modifications that are consistent with our RFP but that might affect the cost to the bidder.

Subsection G (6) provides that the Proposal Review Team may select more than one winning bidder and that the winner or winners shall be the proposal or proposals that score the highest on the Proposal Review Team analysis.

Subsection G (7) provides that a Proposal Review Team may reject a bid that contains false or misleading material information. The Commission should be authorized to reject and otherwise remove from further consideration and analysis any bid that contains such information. Subsection 7 also authorizes the Contract Administrator to bar from future bid participation a bidder that has submitted false or misleading material information. We believe that Subsection 7 will lead to greater efficiency because the Proposal Review Team can cease further evaluation of a bid that contains material false or misleading information. Barring such offending bidders from future bidding will protect the integrity of the bid process.

Subsections G (8) and (9) ensure that bidders receive notice of a contract award at least 14 days before a contract will be entered into with the winning bidder.

Subsection G (10) and (11) provide that the Contract Review Committee must approve the executed contract and that such contract is not effective until the date of approval. For procurement of services subject to DFAS Rule Chapter 110, the Contract Review Committee reviews and approves the selection of the winning bidder as well as the contract itself. During our meeting with the State Purchasing Agent, we discussed the Contract Review Committee and its approval of written contracts. Based

upon those discussions, we propose to submit the written contracts for review and approval. It is only the written contract itself which is subject to approval. Consistent with the statute, the selection of the service provider is not subject to Contract Review Committee approval.

Subsection H delegates the decisions necessary to conduct competitive solicitations for conservation program service providers to the Director of Energy Programs.

Our proposed sections on competitive procurement do not contain any special provisions for T&D utility affiliates. Thus, we decide that affiliates should be eligible to bid and be treated like any other bidder. As the Commission will administer the bid process, we agree with CMP that there is no actual or apparent unfair advantage to allowing an affiliate to bid. The Commission already has a rule (Chapter 820) that prohibits the regulated utility from subsidizing unregulated activity. We believe our existing regulatory and enforcement authority is sufficient to prevent cost subsidization and any attempt of intentional poor contract performance by an affiliate service provider.

3. Section 3: Other Types of Solicitation

Section 3 deals with solicitations of service providers without using a competitive bidding process. The general provision, as stated in the first paragraph of Section 3, is taken from the Conservation Act. 35-A M.R.S.A. § 3211-A(3)(C)(1). Subsections A, B and C define the other types of solicitations that can be used to select service providers and describe the circumstances under which the non-competitive solicitation process “will promote the efficient and effective delivery of conservation programs and is consistent with the objectives and overall strategy of the Conservation Program.” 35-A M.R.S.A. § 3211-A(3)(C)(1).

Subsection A allows for so-called open solicitations. This kind of solicitation process will allow the Commission to establish a conservation program using multiple service providers. We believe that there will be some types of programs that will be “efficiently and effectively delivered” using such an approach.

Subsection B describes the circumstances in which the Commission may choose a single or limited number of service providers without engaging in a competitive bidding process. Subsection B requires a finding of at least one of the three circumstances to warrant the use of a sole source procurement process. Because the use of sole source procurement is the exception rather than the rule, decisions to use a sole source procurement for contracts over \$10,000 remain with the Commission and are not delegated to the Director of Energy Programs.

Subsection C deals with low-income service providers and is taken directly from the Conservation Act.

4. Section 4: Types of Agreements

Section 4 describes the types of contracts or agreements that the Commission will use with various types of service providers such as private entities, public agencies or universities.

5. Section 5: Appeals

Section 5 deals with appeals of contract award decisions.⁴ Subsections A, B and C, concerning the appeal process and the standard for review of contract award decisions, are taken from Chapter 120, Rules for Appeals of Contract and Grant Awards Promulgated by the Department of Administrative and Financial Services, Bureau of General Services.

The Commission can reconsider any decision based on the criteria in the rule. As the agency responsible for administering and implementing the Conservation Act, it is proper for the appeal function to be placed with the Commission.

Subsections D and E deal with the nature of an appeal proceeding. Appeals will be nonadjudicatory proceedings and will follow a process as established by a presiding officer assigned to the appeal. The presiding officer will decide the proper procedure for evaluating and resolving the claims made by the petitioner-appellant.

Subsection G provides that the Commission will not make an alternative contract award decision as a result of any appeal. The various possible future actions are stated.

6. Section 6: Waivers or Exception

Section 6 contains a standard waiver or exemption clause.

IV. FISCAL AND ECONOMIC EFFECTS

“Fiscal Impact” is defined in 5 M.R.S.A. § 8063 as “the estimated cost to municipalities and counties for implementing or complying with the proposed rule.” In accordance with 5 M.R.S.A. § 8057-A(1), in the proposed rule, the Commission stated that it expected no fiscal impact on municipalities or counties. We received no comments on the fiscal impact of this rule. Our expectation of no fiscal impact therefore remains.

⁴ To emphasize that a contract award decision by the Director of Energy Programs and his or her Proposal Review Team is a decision by the Commission, we use the words “petition to reconsider” rather than “appeal” in the provisions of section 5.

V. RULEMAKING PROCEDURES

Pursuant to 35-A M.R.S.A. § 1311-A(10), this rule is considered to be a “routine technical rule” as defined in Title 5, Chapter 375, subchapter 11-A.

Accordingly, we

ORDER

1. That the attached Chapter 381 “Selection of Conservation Program Service Providers” is hereby adopted,
2. That the Administrative Director shall file the adopted rule and related materials with the Secretary of State;
3. That the Administrative Director shall notify the following that the Commission has adopted the attached rule:
 - a. All transmission and distribution utilities in the State;
 - b. All persons who have filed with the Commission within the past year a written request for copies of this or any other Notices of Rulemaking;
 - c. The Office of the Public Advocate; and
 - d. The service list in this docket and all interested persons in Docket Nos. 2002-161, 2002-162 and 2002-272.
4. That the Public Information Coordinator shall post a copy of this Order and rule on the Commission’s World Wide Web page (<http://www.state.me.us.mpuc>); and
5. That the Administration Division shall send copies of this Order and the attached rule to: Executive Director of the Legislative Council, 115 State House Station, Augusta, ME 04333-0115 (20 copies).

Dated at Augusta, Maine, this 9th day of October, 2003.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

This document has been designated for publication

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus